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In the Supreme Court of the United States

October Term, 1945

No. 152.

FRANK CANIZIO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. 152.

FRANK CANIZIO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Statement.

The petitioner seeks a review of an order of the County Court of Kings County, dated April 13, 1945 (Sobel, C. J.), denying his motion to vacate and set aside a judgment of conviction against him, dated June 19, 1931. The motion was based on an allegation that at the respective times of his arraignment, when he pleaded not guilty to the indictment, and subsequently when he withdrew such plea and pleaded guilty, and again later when he appeared for sentence, he was not advised of his right to counsel, and was

in fact not represented by counsel. There has been no perfected appeal from the County Court order to any higher court.[1]

Question Presented.

Petitioner contends that the alleged failure to advise him of his right to counsel and to assign counsel to him had the result "that in the procurement of a judgment against your petitioner, in or about June, 1931 (R. 32) such judgment was had on a palpable violation of petitioner's constitutional rights" (R. 2).

Record Facts Material to the Question Presented.

On May 25, 1931, the petitioner, together with Patsy Guariglia and Tony Bruno, was indicted for the crimes of Robbery in the First Degree; Grand Larceny in the Second Degree, and Assault in the Second Degree, the indictment charging that, acting in concert, they took a taxicab by force and fear from one Joseph Grosshandler, Bruno being at the time armed with a revolver. On that day the defendants so named were arraigned before Kings County Judge Nova and pleaded not guilty. On June 1, 1931, they all personally appeared before Judge Nova, withdrew their pleas of not guilty and pleaded guilty to the crime of Robbery in the First Degree, unarmed. On June 19, 1931, the petitioner was sentenced to a term of fifteen to thirty years in State's Prison.

In the moving papers before Judge Sobel, the petitioner alleged that at the time of the arraignment and plea he was nineteen years of age and unfamiliar with legal procedure. He further claimed that on both of these occasions he was

[1] In a later portion of this brief we discuss the non-appealability of such an order in its relation to the questions presented by this petition.

without counsel, was not advised by the court of his right to counsel, and was not asked by the court if he desired that counsel should be assigned. He makes the same allegations with respect to the day of sentence. These allegations are now incorporated in the petition before this court (R. 10-11).

The respondents now, as in the proceeding in the County Court, challenge the accuracy of these allegations of non-representation by counsel. The records of the County Court in the matter are silent as to the fact of representation on the occasion of the petitioner's arraignment on May 25, 1931, and of his plea of guilty on June 1, 1931 (R. 4-5). They do show, however, that on June 17, 1931, and thus two days before the day of sentence on June 19, 1931, a notice of appearance was filed in his behalf by an attorney named John J. Olivia, and that Mr. Olivia appeared in his behalf on the day of sentence.

The People have heretofore urged, and do now respectfully contend, that as to the day of arraignment and the day of plea, a presumption of regularity exists to the effect that the trial court performed its duty in the premises and advised the petitioner of such rights as he enjoyed. The respondents now point out that with respect to the day of sentence the petitioner's statement that he was not represented by counsel is completely and effectually contradicted by the record.[2]

Jurisdiction.

The petitioner has not perfected an appeal from the order of April 13, 1945, denying his motion to vacate and set aside the judgment of conviction dated June 19, 1931, because such an order is not appealable (*People* v. *Gersewitz*, 294 N. Y. 163). The jurisdiction of this court is sought to be invoked under Section 237 (b) of the Judicial

[2] The effect of such representation by counsel at and before the time of sentence will be discussed at pages 5, 8, of this brief.

Code as amended (28 U. S. C. A., Sec. 344 [b]), on the ground that the order of the Kings County Court being under New York practice non-appealable, that court therefore becomes the "highest court of the state in which a decision could be had * * *."

It is our purpose in this brief to prove that jurisdiction does not exist for the purposes contended by the petitioner, because: (1), He has failed to exhaust his remedies in the courts of the State of New York, and thereby has not proceeded to the highest court in which a decision could be had, and (2), Because no federal question of due process of law is presented to this court.

Argument.

I.

The petitioner's contention may be briefly summarized as follows: by virtue of the law of New York, both constitutional and statutory, he was, if without counsel of his own choosing, entitled to have counsel assigned by the court at the time of arraignment, plea and sentence. The failure of the court to apprise him of such right and then to accord it to him was a deprivation of the rights guaranteed him under the Constitution of the United States.

That the right "to appear and defend in person and with counsel" is guaranteed by the Constitution of the State of New York (Art. 1, Sec. 6) is not disputed. That such a right is further implemented by statute (Code of Crim. Proc., Secs. 8, 308) is likewise conceded. That these rights have been violated, however, is disputed by the People. And, even if, conceding *arguendo*, such violation did occur, it is further disputed that any federal constitutional question is thereby presented.

The People submit that the petitioner has not sustained the burden of proving a failure at the time of arraign-

ment and plea to advise him of his right to counsel or to assign such counsel upon his request. The mere silence of the record in these respects does not assume the character of affirmative proof. It can never be presumed that a judicial officer has failed in the performance of a duty laid upon him by statute: in this instance the obligation to ask a defendant appearing for arraignment without counsel "if he desired the aid of counsel, and if he does the court must assign counsel" (Code of Crim. Proc., Sec. 308). On the contrary, presumption exists strongly that the court did perform its duty (*People ex rel. Kennedy* v. *Hunt*, 21 N. Y. Supp [2d] 302, aff'd 257 App. Div. 1039; *People* v. *Fisher*, 223 N. Y. 459, 464, where the court said:

> "It is a general rule that an official is presumed to have proceeded regularly, and when an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that those preliminary acts have also been done * * *. The assumption that officials do their duty applies in criminal cases * * *."

In the instant case, moreover, there is affirmative proof that before the day of sentence, petitioner was actually represented by counsel. Assuming, *arguendo*, that up to this point petitioner had been without benefit of counsel, the appearance of an attorney worked a great change in the situation. Such counsel could have moved in behalf of petitioner in effective manner to protect his rights and to remedy such infraction thereof as had occurred. Thus, a motion could have been made at any time prior to judgment for leave to set aside the plea of guilty on various grounds, including that of misapprehension of the nature of the plea of guilty, the youth and inexperience of the petitioner, etc. (Code of Crim. Proc., Sec. 337), and the court in its discretion would have had plenary power to grant such motion and put petitioner to his trial (*People* v. *Gowasky*, 244 N. Y. 451). This was not done. Counsel

for the petitioner appeared on June 19, 1931, participated in the proceedings and made no motions addressed to the plea itself or to any other defect or deficiency in the proceedings up to that point. Petitioner now contends that because of his youth and claimed inexperience he cannot be held to have waived any right to counsel (R. 11). As to his inexperience, that is at least a debatable characteristic, for the records on file in the Kings County Court indicate that in 1928 he was pronounced a juvenile delinquent and that in 1931 he was charged with the crime of Grand Larceny (although the charge was dismissed by the Grand Jury, on January 31, 1931).

As to the waiver, however, it is submitted by the People that, were the question of waiver in issue here, the failure of counsel to move at the time of or before sentence and judgment on behalf of the petitioner was indeed such a waiver arising out of the legal maxim *"qui facit per alium facit per se" (People* v. *Walker*, 198 N. Y. 329).

We proceed to the question of jurisdiction of this court to entertain the instant petition. If in fact the petitioner pleaded guilty to a crime without the benefit of counsel and in violation of the statutory direction that he be advised by the court of such right to counsel, and upon request assigned such counsel (Code of Crim. Proc., Sec. 308), then the judgment of the court subsequently entered on June 19, 1931, was a nullity (*People ex rel. Moore* v. *Hunt*, 258 App. Div. 24). From such void judgment he could have appealed even though the judgment was rendered on a plea of guilty (Code of Crim. Proc., Sec. 517; *People* v. *Ward*, 148 Misc. 94; *People* v. *Palaguay*, 216 App. Div. 508). The basic defect in the judgment would have been revealed in the record on appeal. It is precisely because a record on appeal discloses such defects that appeal is the proper remedy (*Matter of Morhous* v. *New York Supreme Court*, 293 N. Y. 131, 140). By such appeal he could have proceeded as a matter of right to the Appellate Division of the Supreme Court (Code of Crim. Proc.,

Sec. 520), and, under proper circumstances and by proper leave, to the Court of Appeals (Code of Crim. Proc., Sec. 520, subdiv. 3). In at least one of these two courts, both higher than and superior to the County Court of Kings County, there would have been a decision "by the highest court of a state in which a decision could be had" (Sec. 237 of the Judicial Code, Tit. 28, Sec. 344b). Instead, and as a matter of volition and choice, the petitioner abandoned all right of appeal and chose, some fourteen years after the event, to initiate this proceeding in the nature of a motion *coram nobis*.[3]

Section 237 of the Judicial Code does not mean that jurisdiction is conferred upon this court to review any cause wherein a final judgment or decree has been rendered by the highest court of a state in a particular proceeding *chosen by the litigant*. On the contrary, jurisdiction is conferred upon this court only after the litigant has been to the highest court in *any* proceeding which was open to him because of the nature of his grievance (*McKnight* v. *James, Warden of the Ohio Penitentiary*, 155 U. S. 685).

To re-state the proposition: by an appeal from the judgment of conviction the petitioner could have presented the present question either to the Appellate Division of the Supreme Court, or to that court and to the Court of Appeals and thus could have procured a determination by a court higher than the County Court of Kings County.

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[3] The advantage to the petitioner of such a choice is obvious and clearly exposes the reason motivating the choice. Had he proceeded to an appeal in 1931 he would, in the event of success on his part, have been immediately subjected to a trial at which the People could have procured witnesses and successfully have established the fact of his guilt of Robbery in the First Degree, while armed, for the carrying of the pistol by his confederate Bruno was in law its possession by this petitioner (*People* v. *Paradiso*, 248 N. Y. 123). Delay has worked in favor of the petitioner by almost geometric progression. Those witnesses who in 1931 could have been relied upon to establish the People's case cannot be produced in 1945 with the same facility, if they are at all in existence or producible.

In that event and if a federal question actually existed, this court would then have had jurisdiction by virtue of the Judicial Code, Sec. 344b. Petitioner's failure to avail himself of the right of appeal and his choice of a different method of procedure cannot confer a jurisdiction upon this court not otherwise existing.

The instant case therefore comes expressly within the opinion of Mr. Justice Frankfurter in *Whitman* v. *Wilson* (318 U. S. 688), in which he wrote as follows:

> "Since the argument in this case, the New York Court of Appeals formally dismissed petitioner's appeal to that court from the order of the Appellate Division denying him habeas corpus, on the ground that 'the case is one where appellant is not entitled to a writ of habeas corpus under Section 1231 of the Civil Practice Act'. But inasmuch as 'the constitutional questions which appellant asked the court to review are substantial,' to use the language of Chief Judge Lehman, he could, under New York practice, have gone to the Court of Appeals as of right if habeas corpus were the proper remedy. The merits of petitioner's constitutional claim have therefore never been passed on by, because never presented in an appropriate proceeding to, the highest available New York court. Consequently, it cannot be entertained here. *Since petitioner has misconceived the mode by which his constitutional claim may properly be brought before the New York courts, this petition should be dismissed.*
>
> Mr. Justice Roberts and Mr. Justice Reed join in this opinion." (Italics ours.)

It is also important to point out that after the appearance of counsel in behalf of the petitioner such an appeal might have been utilized to carry to the appellate court any claimed impropriety or injustice in the denial of a motion to set aside the plea of guilty had such motion been made (Code of Crim. Proc., Sec. 517; *People* v. *Joyce*, 41

Hun 641). This, we submit, is another instance of the demonstrated fact that the petitioner has failed to carry his case to the highest court in which a decision might have been had.

There is a further aspect to the failure of the petitioner to appeal from the judgment of conviction. If in law and in fact his constitutional rights had been violated by the failure to advise him of his right to counsel, and by the further failure to assign such counsel, and if there were no proceeding available to him in the state court to right this grievance (*e.g.*, a writ of habeas corpus or a motion *coram nobis*) then a constitutional question both state and federal might have been presented. (*Matter of Lyons* v. *Goldstein*, 290 N. Y. 191), where the court (speaking of Section 2188 of the Penal Law which prohibits the suspension or interruption of imprisonment after it shall have commenced), wrote:

> "If the order of Special Term were to be sustained upon a construction of the foregoing statutes in manner contrary to what we have found to be their proper construction, the statutes would be repugnant to the due process clauses of the Constitution of the United States and of the State of New York which can be satisfied, at least, only when a person may be granted a hearing upon the merits before a competent tribunal where he may appear and assert and protect his rights * * *. Indeed it is settled that to deny a person an opportunity to be heard on proof that he was defrauded or coerced into pleading guilty to a crime would impair a constitutional right * * *" (pp. 24, 25).

Such "hearing upon the merits before a competent tribunal" is however, provided in the motion *coram nobis* (*Lyons* v. *Goldstein*, *supra*) actually made by the petitioner. It is true that an order denying such motion is, under state statutes, not appealable (*People* v. *Gersewitz*, *supra*). There is, however, no constitutional right in the

State of New York to an appeal, such right being granted only by statute (*People* v. *Reed*, 278 N. Y. 5; *People* v. *Zerillo*, 200 N. Y. 443). In essence, therefore, the petitioner now complains to this court not that he has been deprived of a constitutional right in that no tribunal would hear his complaint *in any form*, but only because no appellate court would entertain an appeal. It therefore follows that there being no constitutional right of appeal, and there being an affirmative provision for a hearing which has been accorded the petitioner, none of his constitutional rights has been violated. He is in effect complaining to this court that the Constitution of the State of New York does not provide for a right of appeal other than as such right may be established by the legislature. We respectfully submit that such a complaint has never been held to be the basis of a federal question under the due process clause.

The question therefore arises as to the actual existence of a federal question under the due process clause, and may be stated thus: is there *under all circumstances* a federal constitutional right to the assignment of counsel? Petitioner asserts vociferously that such right exists. The People submit that in many instances and particularly in the instant case the right does not exist in such form that a deprivation thereof is a violation of either the Sixth or the Fourteenth Amendments to the Constitution of the United States. In support of this proposition we point to the decision of this court in *Betts* v. *Brady, Warden* (316 U. S. 455).

Betts was indicted in Maryland for the crime of Robbery. He was unable to employ counsel and so informed the court when arraigned, and requested that counsel be assigned. This request was refused on the ground that in that court it was the practice to appoint counsel for indigent defendants only on prosecutions for Murder and Rape. Betts thereupon, without waiving his claimed right to counsel, pleaded not guilty and proceeded to trial without a jury. At the trial witnesses summoned in his behalf

were examined and he cross-examined the state's witnesses. He did not take the witness stand. He was found guilty and sentenced to a term of eight years. While incarcerated, he filed with a judge of a county circuit court a petition for a writ of habeas corpus, based on the claim that he had been deprived of the right to counsel guaranteed by the Fourteenth Amendment of the Federal Constitution. The cause was heard on the writ, his contention rejected, and he was remanded to the custody of the warden. Thereafter he petitioned for a similar writ on the same grounds before the Chief Judge of the Maryland Court of Appeals, with a like result. Betts thereupon petitioned this court for a writ of certiorari which "on account of the importance of the jurisdictional questions involved and conflicting decisions upon the constitutional question presented" was issued. The constitutional question was put by Mr. Justice Roberts as follows:

> "Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?"

This court answered the question in the negative (Black, Douglas and Murphy, JJ., dissenting). The court held that there is no single all-embracing rule whereby the question of due process or a deprivation thereof can be determined, either in the case of the federal government (Fifth Amendment) or in the case of the states (Fourteenth Amendment). The court said:

> "The phrase (i.e. due process of law) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial *is to be tested by an appraisal of the totality of facts in a given case*" (462). (Italics ours.)

The court then proceeded to distinguish cases involving the denial of counsel (*Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444; *Smith* v. *O'Grady*, 312 U. S. 329), from the facts in the instant case. Here it was found that:

> "In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation."

If we apply the standard adopted by this court in *Betts* v. *Brady*, to the circumstances surrounding the arraignment and conviction (by his own plea of guilt) of the petitioner, there is evident, nay obvious, a striking similarity in the cases. This petitioner was no mere youth, innocent of the crime of which he was charged, ignorant of the rules of law, and bewildered by the formality of courts and court procedures. As we have said, he had already been

adjudged a juvenile delinquent and must therefore, have appeared in a court for that purpose and in connection with that experience (as a result of which in 1928, he was incarcerated in the House of Refuge [R. 15]). He had also been arrested for the crime of Grand Larceny and must have appeared again in a Magistrates' Court for the hearing which held him for the action of the Grand Jury. The independent investigation of the court which here sentenced him disclosed that after the petitioner and his accomplices had, at the point of a gun, stolen the taxicab involved in the indictment, they held up and robbed two other men, and that the next night they stole a Buick automobile (R. 16). In this stolen automobile they proceeded to a further Attempted Robbery, but were apprehended. In the automobile were found four fully loaded revolvers. One contained bullets which this petitioner "admitted that he sliced the point of the bullet and in the language of one understanding that knows that permits the lead to spread out when the bullet is fired and when it reaches the object it hits causing more certainty of death or injury and prevents the bullet in spreading the object that it hits from being identified later on" (R. 17).

It should be remembered, in answer to the petitioner's claim of youth and inexperience, that at the time he pleaded guilty to Robbery in the First Degree, unarmed, he faced a much more severe sentence, if convicted after trial on the indictment for Robbery, while armed. Moreover, he also faced prosecution on another indictment for the theft of the Buick automobile. It is beyond question that his plea of guilt with respect to the robbery and theft of the taxicab was induced, not by any inexperience or lack of knowledge, but by the fact that such plea guaranteed him a dismissal of the other indictment with respect to the Buick automobile (R. 18). He is very definitely like the petitioner Betts, of whom the court, with an understatement equally applicable to this petitioner, said: "was not wholly unfamiliar with criminal procedure".

We therefore submit that under the latest and most authoritative decision of this court the failure to apprise this defendant of his right to counsel, if such failure actually occurred, was not a violation of any right guaranteed to him by the federal constitution, and, therefore, regardless of any right created in his behalf by New York statute or constitutional law, did not raise a federal question for the consideration of this court. We believe the language of this court in *Betts* v. *Brady, supra,* may be quoted by us as a complete answer to the petitioner's contention:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel" (473).

In Conclusion.

We respectfully submit:

1. The case presented by the petitioner is not one concerning which this court has jurisdiction under Section 237 of the Judicial Code, Tit. 28, Sec. 344b, because of the fact that no "final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * *."

2. That no federal question is raised by any contention made by the petitioner in the case presented to this court.

II.

The petition should be denied.

Respectfully submitted,

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Appendix.

Section 517, New York Code of Criminal Procedure.

"Sec. 517. *In what cases an appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals. * * *."

Section 520, New York Code of Criminal Procedure.

"Sec. 520. *Appeal, a matter of right; one appeal; how taken.*

All appeals, provided for by this chapter may be taken as a matter of right. Every person convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal as herein provided, but there shall be only

one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided:

1. In the City of New York such appeals shall be taken as follows: * * * from a conviction by the court of general sessions of the County of New York or by a county court within said city * * * except where the penalty is death, to the Appellate Division of the Supreme Court * * *.

2. * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a justice of the Appellate Division of the Supreme Court * * * certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

4. * * *."